No. 15376

United States
Court of Appeals
for the Ninth Circuit

JAY W. SELBY, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-14-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

J. H. BRILL,
1069 Mills Building,
San Francisco 4, California,

For Defendant & Appellant.

LLOYD H. BURKE,
United States Attorney,

R. H. FOSTER,
Assistant United States Attorney,

U. S. Post Office Building,
San Francisco, California,

For Plaintiff & Appellee.

In The United States District Court, Northern District of California, Southern Division

Criminal No. 35125

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAY W. SELBY, Defendant.

INDICTMENT

(Violation: Section 12(a), Universal Military Training & Service Act, 50 U.S.C. App. 462(a)—Refusal to Submit to Induction.)

The Grand Jury charges: That Jay W. Selby, defendant herein, being a male citizen of the age of 24 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948," as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 66 of the Selective Service System in the City of Salinas, County of Monterey, State of California, which said Local Board No. 66 was duly created,

appointed and acting for the area of which the said defendant is a registrant, did, on or about the 1st day of November, 1955, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty in that he, the said defendant, having theretofore been duly classified in Class 1-A and having theretofore been duly ordered by his said Local Board No. 66 to report at Salinas, California, on the 1st day of November, 1955 for forwarding to an induction station for induction into the Armed Forces of the United States, and having so reported, and thereafter having been forwarded to an induction station, to-wit, in the City and County of San Francisco, did, on the 1st day of November, 1955, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act and the rules and regulations made pursuant thereto.

A True Bill.

/s/ RICHARD A. GICK,
Foreman.

/s/ LLOYD H. BURKE,
United States Attorney.

Approved as to Form:
/s/ J. H. RIORDAN, J.

[Bail $500.00—1-Count Indictment. Violation:—Sec. 12(a) Universal Military Training & Serv-

ice Act, 50 USC App. 462(a)—Refusal to Submit to induction. Penalty: Imprisonment not to exceed 5 years and/or fine not to exceed $10,000.]

[Endorsed]: Filed June 6, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

At A Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 27th day of August, in the year of our Lord one thousand nine hundred and fifty-six.

Present: The Honorable Michael J. Roche, District Judge.

This case came on this day for trial before the Court without a jury, jury having been waived in writing. Donald B. Constine, Esq., Assistant United States Attorney, was present on behalf of the United States. John Brill, Esq., appeared as attorney for defendant. Opening statements were made by respective counsel. Mr. Constine introduced in evidence and filed a certain exhibit which was marked U. S. Exhibit No. 1. Thereupon the Government rested. After a statement and a Motion for Judgment of Acquittal by counsel for defendant, the defendant rested. Mr. Constine introduced in evidence and filed another exhibit which was marked U. S. Exhibit No. 2.

After arguments by respective counsel, It Is Ad-

judged that the defendant Jay W. Selby is Guilty as charged in the indictment.

Ordered case continued to September 4, 1956, for hearing on motions and for sentence. Ordered that defendant may remain on bond heretofore posted.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 29 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, July 24, 1956.

/s/ JAY W. SELBY,
Defendant.
/s/ J. H. BRILL,
Attorney for Defendant.
/s/ R. H. FOSTER,
Assistant U. S. Attorney.

Approved:

LOUIS E. GOODMAN,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed July 24, 1956

In The United States District Court, Northern District of California, Southern Division

No. 35125

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAY W. SELBY, Defendant.

JUDGMENT AND COMMITMENT

On this 4th day of September, 1956 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of violation of Section 12(a), Universal Military Training & Service Act, 50 U.S.C. App. 462(a)—Refusal to Submit to Induction.

(Defendant Jay W. Selby did, on November 1, 1955, at San Francisco, California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States), as charged in the indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Examined by:

/s/ DONALD B. CONSTINE,
Assistant U. S. Attorney.

The Court recommends commitment to: an institution to be designated by U. S. Attorney General.

C. W. CALBREATH
Clerk

/s/ By F. R. PETTIGREW
Deputy Clerk

A True Copy. Certified this 5th day of October, 1956.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By WM. J. FLINN,
Deputy Clerk.

Entered In Criminal Docket: 9/4/1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: J. W. Selby, 319 Elkhorn Road, Watsonville, California.

Name and address of appellant's attorney: J. H.

Brill, 1069 Mills Building, San Francisco 4, California.

Offense: Violation of Selective Service Training Act.

Judgment rendered September 4, 1956: Defendant found guilty. Sentence: Defendant to be committed to the custody of the Attorney General for a period of two years. Motion for bail pending appeal granted.

I, the above named appellant, by my attorney, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: September 4, 1956.

/s/ J. H. BRILL,
Attorney for Appellant.

[Endorsed]: Filed Sept. 4, 1956.

[Title of District Court and Cause.]

POINTS UPON WHICH DEFENDANT WILL RELY PURSUANT TO RULE 17 (6); DESIGNATION OF RECORD MATERIAL TO CONSIDERATION

The points upon which defendant will rely in substance are:

1. The trial court committed error in rendering a judgment against defendant and in failing to acquit him.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the conscientious objector status by the local board and the board of appeal and the recommendation by the hearing officer of the Department of Justice and by the Department of Justice and board of appeal were without basis in fact, arbitrary, capricious and contrary to law.

4. The report of the hearing officer relied upon by the Department of Justice and the board of appeal is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and advises the appeal board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector.

5. The local board deprived the defendant of procedural due process of law by permitting prejudicial self-serving statements of others to be contained in the file in a manner not permitted by the Universal Military Training and Service Act or the federal regulations applicable thereto.

Defendant designates the following record which is material to the consideration of his appeal: All of the reporter's transcript, together with the exhibits received in evidence, the indictment, minutes of the court, waiver of jury, motion for judgment of acquittal, judgment and commitment and notice of appeal.

Respectfully submitted,

/s/ J. H. BRILL,

Attorney for Defendant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed Oct. 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and Exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the appellant:

Indictment.

Minutes of the Court for August 27, 1956.

Judgment & Commitment.

Waiver of Jury Trial.

U. S. Exhibits #1 & 2.

Notice of Appeal.

Designation of Record & Points Pursuant to Rule 17 (6).

In Witness Whereof, I have hereunto set my hand and seal of said District Court, this 5th day of October, 1956.

[Seal] C. W. CALBREATH,
Clerk.
/s/ WM. J. FLINN,
Deputy Clerk

In The United States District Court, Northern District of California, Southern Division

No. 35,125

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAY W. SELBY, Defendant.

REPORTER'S TRANSCRIPT

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Lloyd H. Burke, United States Attorney, by: Donald B. Constine, Esq. For the Defendant: John Brill, Esq.

August 27, 1956 [1]*

The Clerk: United States vs. Selby for trial.

Mr. Constine: Ready, your Honor.

Mr. Brill: Ready.

The Court: You may proceed.

Mr. Constine: May it please your Honor, this is a case in which the defendant was indicted on June 6 of 1956 for refusal to submit to induction. This is a Selective Service case, and the defendant claims he is a Jehovah's Witness.

Now, I might state that the indictment charges this defendant, a male citizen of the United States, 24 years of age, being a registrant of Local Board 66 in Salinas, California. The indictment charges

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

on November 1, 1955, of last year, having been classified 1-A by the Draft Board, this defendant in San Francisco refused to submit to induction. That is the charge.

Now, it is stipulated by counsel for the defendant and counsel for the Government that a copy, a certified copy of the Selective Service file, a certified photostatic copy of that file, may be introduced in evidence in place of the original file. Is that correct?

Mr. Brill: So stipulated.

Mr. Constine: It is also further stipulated that on November 1, 1955, at the San Francisco Armed Forces Induction Station this defendant refused to submit to induction after having the ceremony read to him twice. Is that correct? [3]

Mr. Brill: That is correct.

Mr. Constine: That will save the necessity of bringing in the military witnesses who will testify that the defendant did not step forward as ordered.

May it please Your Honor, may the Selective Service file then be marked, a photostatic copy, a certified photostatic copy of the Selective Service file of this registrant be marked Government's Exhibit 1 in evidence at this time?

The Court: It may be admitted and marked.

The Clerk: Government's Exhibit 1 admitted and filed in evidence.

(Whereupon the file referred to was admitted in evidence and marked Government's Exhibit 1.)

Mr. Constine: Now, may it please Your Honor,

as is customary in these cases, the Government wishes to review this file for Your Honor's benefit, calling Your Honor's attention to certain documents, and beforehand I have already marked by slips of paper the documents I will call to Your Honor's attention so that will save the necessity of looking for the index numbers, which are very difficult to find.

Now, may it please Your Honor, the first document, which should be the first sheet of paper in the file, the top document, is a registration card of this defendant. It is the very first page of the file, Your Honor, the registration card. I merely point that out to Your Honor inasmuch as it [4] shows that this defendant first registered on July 18, 1950, and that he indicates his birth date was February, 1932. Now, the document we wish to call to Your Honor's attention for examination I have numbered No. 1 and it is the classification of this defendant submitted to the Local Board in April of 1951. Mr. Brill, you have that document?

Now, Your Honor, on page 3 of the classification questionnaire that is the actual printed number on the questionnaire itself, page 3, Series 6, "Minister or student preparing for the ministry"—does Your Honor find that?

The Court: I have it.

Mr. Constine: I point that out to Your Honor that there is no claim whatsoever when this defendant first filed this questionnaire that he was a minister or a student preparing for the ministry.

I call to your attention, may it please Your

Honor, to page 7 of the questionnaire, of the same document, Series 14 at the top of page 7 in which there is no claim made that this defendant is conscientiously opposed to war. The defendant has not filled the particular series; that's on the top of page 7. There is no signature.

Now, Your Honor, I might state that following the filing of this questionnaire of April 30, 1951, this defendant was then classified 1-A. I might point also, may Your Honor please, in this questionnaire, on page 2 of the questionnaire, [5] the same document, in the middle of the page, at the time he filed the questionnaire this registrant stated he was presently a member of a reserve component of the Armed Forces, Seaman Recruit, in the Naval Reserve. And he states he entered into such component on April 3, 1951, and that he was performing service in such component by satisfactorily participating in schedule drills and training periods as prescribed by the Secretary of Defense. As I stated, Your Honor, on April 30, 1951, following the submission of this questionnaire, this defendant was then classified 1-A.

Now, the next document I wish to call to Your Honor's attention is the special conscientious objection questionnaire, which is No. 2 on the slip of paper that I have before Your Honor. I have little slips of paper sticking out of the top of the file, your Honor, and it would be No. 2.

Mr. Brill: What number in the file?

Mr. Constine: It's actually dated July 1, 1952. There are two series of numbers, awfully difficult to find. Your Honor have that?

The Court: I have it.

Mr. Constine: This questionnaire is dated July, 1952, Your Honor, and page 2 of that questionnaire, the top of the page, Item No. 3, the defendant states in answer to the question, "Explain how, when and from whom or from what source you received training and acquired the belief which is the [6] basis for your claim," he states "Early in 1951 I was working away from home. When returning we had a Bible study in our own home and attend meetings at the Kingdom Hall located in Watsonville where I learned the truth of God's word, the Bible." I merely point that out to Your Honor, that is during the same period he was a member of the Naval Reserve.

May I call to Your Honor's attention the next document I have numbered for Your Honor's benefit, No. 3, which is the hearing before the Local Board of August 11, 1952. I have numbered that No. 3 in Your Honor's file.

Now, on the last page of that—I should say on the next to the last page of that hearing before the Local Board on August 11, 1952, the defendant stated that he would only accept a minister's classification and would not accept the conscientious objector's classification from Selective Service. I might say that on the same date of this hearing, August 11, 1952, this defendant was classified 1-A by his Local Board.

The next document I wish to call to Your Honor's attention is numbered in Your Honor's file as No. 4, that's the slip of paper from the top of the file,

No. 4, which is a letter dated September 30, 1952, from the defendant to the Local Board. Your Honor, the concluding paragraph of this letter is as follows:——

(Colloquy between counsel, inaudible to the reporter.) [7]

Mr. Constine: He states: "Because I am a law-abiding citizen of this country I wish to pursue the orderly course of accepted procedure in matters of vital consequence. I therefore request a personal appearance before your Board so that I may offer affidavits and other valid reasons for possible reclassification of my status from 1-A to 1-AO."

Now, I might point out to Your Honor at this time, that is, September 30, 1952, the defendant states he would be willing to accept a non-combatant position in the United States Army. Here he is not objecting to service, but he is objecting to combatant service, and this was on September 30, 1952. I might state that following a hearing he was continued in Class 1-A on November 3, 1952.

Now, the next document I wish to call to Your Honor's attention is the document I have numbered No. 5, which is——

Mr. Brill: What is the date of that?

Mr. Constine: This is dated January 8, 1953, and it is an appeal of the defendant to the Appeal Board from his classification of 1-A. I merely point this out to Your Honor's attention for this reason: a registrant is given 10 days to appeal from the Local Board's classification. This in January of

1953 was far beyond his 10-day limit. However, because of an honest error on his part he did not receive his classification and therefore he was permitted to appeal even though it was beyond the 10 days. I merely point that [8] out to Your Honor's attention, that he was permitted to appeal although beyond the 10-day period.

Now, may it please Your Honor, I wish to call to Your Honor's attention a document that I have numbered in Your Honor's file as No. 6, which is a memorandum dated March 20, 1953, by the Local Board. It is a memorandum of the Local Board dated March 20, 1953; for the record at this time I wish to read this document specifically into the record. It states as follows:

"Mr. and Mrs. E. Knauss of Santa Cruz were in the office today and were very much incensed over the fact that Jay W. Selby is not in the service. Mr. Knauss has one boy in Korea and another one which was 18 last February. Both boys, however, are in the National Guard.

These people stated that out of all the boys called for physical induction at the time of their own son are now in the service with the exception of Selby. (That is the school class in which they all went to school together.) Jay Selby too was in the National Guard; went in the same day as this man's son and they were both asked whether they were 'conscientious objectors.' Both answered 'no.' Whereupon both were allowed to join the National Guard. However, when it became time for induction, young Selby said he wasn't going. He was going to join the

church of 'Jehovah's Witnesses' [9] and be smart. He was going to work and make a lot of money like some people did in World War 2. He wasn't going to be a fool.

Mr. Knauss said Selby has a good job, drives a big car and brags about the fact he isn't in the service and won't be; about the money he is making, etc. Neighbors are getting more incensed by the day as their children are having to go, and Mr. Knauss said they are saying that Selby has an 'in' with the Board members and that is why he is not in the Army. The Knauss boys are registered with the Santa Cruz Board No. 59. Mr. and Mrs. Knauss do admit that Selby goes to church but that he could be a chaplain in the service if he won't fight, and that he should be in the service, and that he and the neighbors are 'good and sore about it' ".

Now, the next document I wish to call to Your Honor's attention is the document I have numbered No. 7, which is the recommendation of the Department of Justice to the Appeal Board dated May 13, 1953. That's the first recommendation of the Department of Justice, Mr. Brill. That's the document I have numbered No. 7 in Your Honor's file.

I would like to call to Your Honor's attention the last page of that recommendation, rather, I should say the second page of that recommendation, and read it into the record as [10] follows:

"The registrant bears a good reputation in the community but few of the persons interviewed believe that the registrant's conscientious objector claim is made in good faith. Most persons were of

the opinion that the registrant joined the Jehovah's Witnesses because he did not want to go into military service. The registrant's references stated that they thought he was sincere. One of the registrant's neighbors and two teachers stated that they thought he would be sincere. However, they did not know he was a Jehovah's Witness, had not observed any religious activity on the part of the registrant, and had not discussed military service with him."

This paragraph is the important one, Your Honor.

"The Hearing Officer was of the opinion that the registrant had failed to sustain his conscientious objector claim."

The letter goes on:

"The views expressed by the registrant in his S.S.S. Form No. 150, which are set forth above, are consistent with the published views of the Jehovah's Witnesses sect. The registrant states that he is not a pacifist. The sect has defined pacifism as 'opposition to war or to the use of military force for any purpose.' It is [11] clear that the registrant is not opposed to war in any form, and he is, therefore, not entitled to exemption . . . "

And it goes on to find that it is recommended that:

"It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and non-combatant training and service be not sustained."

I might point out to Your Honor that the Hearing Officer at that time was Ernest E. Williams, who is still the Hearing Officer of this District.

I might state that following this recommendation

the defendant was placed in Class 1-A by the Appeal Board. He was ordered for induction on July 15, 1953, and he refused induction and was indicted back in 1953.

Mr. Brill: Excuse me, counsel. You said the Hearing Officer was Ernest E. Williams. I don't see that appears anywhere.

Mr. Constine: Yes, the very first paragraph of the letter," . . . was given to the registrant by Hon. Ernest E. Williams, Hearing Officer . . . "

Mr. Brill: Oh, I see.

Mr. Constine: May it please Your Honor, I wish to call to your attention the document I have numbered No. 8, which is a letter dated January 14, 1954, addressed to the Local Board from the Office of the United States Attorney. [12] It indicates that the defendant Selby before United States District Judge O. D. Hamlin on January 13, 1954, was acquitted of the first charge of refusal to submit to induction.

In that connection, Your Honor, I wish to call Your Honor's attention to the next document, which would be document No. 9 in Your Honor's file. I have it marked No. 9 with a little slip of paper.

The Court: Selective Service System?

Mr. Constine: Yes, that's correct, Your Honor, from Major Ferrill to the Selective Service System, a letter dated January 28, 1954, in which the Local Board is informed that the letter from the two neighbors complaining about Selby's activities was not considered by the Local Board. It was forwarded to the Appeal Board after the matter was

considered and therefore, it was the belief of Selective Service that this defendant apparently was denied his rights under due process, and that resulted in the acquittal before Judge Hamlin. Therefore, I might state from this letter on we then commenced the entire reclassification system again. The defendant then starts anew.

On September 13, 1954, he was classified 1-A. On October 11, 1954, he was classified 1-A, and I will call Your Honor's attention to document No. 10 now, which is a letter from the registrant dated October 16, 1954, advising the Local Board that he disagrees with their classification in [13] 1-A and he is appealing the classification. So I might state to Your Honor this is now the commencement of the second appeal of this registrant.

The Court: October the 18th?

Mr. Constine: October the 16th. Yes, it was received by the Local Board on October 18, 1954. And that is the commencement of the second appeal of this registrant.

Now, the next document I wish to call to Your Honor's attention is a document that I have numbered No. 11, which is the recommendation of the Department of Justice, dated June 7, 1955, received by the Appeal Board June 13, 1955. In the first paragraph of the letter it is indicated as follows:

The Court: The date?

Mr. Constine: The date is June 7, 1955, that is the date of the letter. It was received by the Appeal Board June 13, 1955. It is Your Honor's No. 11.

The Court: June 7.

Mr. Constine: '55.

The Court: Proceed.

Mr. Constine:

"As required by Section 6(j) of the Universal Military Training and Service Act, an inquiry was made by the Department of Justice in the above-mentioned case and an opportunity to be heard on his claim for [14] exemption as a conscientious objector was given to the registrant by Hon. Ernest E. Williams, a Hearing Officer for the Department of Justice."

I might state, Your Honor, that this is the same Hearing Officer that heard the defendant the first time.

I wish to read from page 2, now, after a brief history of this defendant is stated on page 1.

"The registrant appeared personally for his hearing accompanied by his father."

I might state, your Honor, at this time and at the time of this hearing an F.B.I. investigation was made and under the regulations today the registrant is given a resume of that F.B.I. report and it is actually attached to this letter so the defendant will be advised of what others may say about him so he is in a position to protect his interests.

"He made several objections concerning the resume of the investigative report. He stated that although a majority of the former employees opined that he was insincere and was trying to evade the draft, it was not necessary for him to evade the draft because he was in the Naval Reserve. He stated that

subsequently, the Navy gave him an Honorable Discharge because of his religious beliefs."

I might state the paragraph at the bottom of the page:

"The registrant testified that during 1954, he 'pioneered' in Jehovah's Witnesses ministry for about two months. He contended that he was [15] unable to serve a longer period of time as a 'pioneer' because it was necessary for him to make a secular living. He stated his ambition in life is to become a 'Pioneer Minister' and earn a livelihood by part-time work. He stated that because of his religious training and belief, he could not engage in noncombatant military service, such as hospital corps. He stated that he has dedicated his life to Jehovah, and that any type of military service would be inimical to his principles. He told the Hearing Officer that if he were classified 1-O . . ." Now, that is the conscientious objector classification. "He told the Hearing Officer that if he were classified 1-O, he would be unwilling to engage in civilian work for the Government, because to perform such a non-military service would be 'breaking his covenant with God and would be a compromise of his covenant.' He added that those Jehovah's Witnesses are not pacifists, they are opposed to war in any form and regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed.' "

Reading from page 3 now. He testified that during the past month he has devoted 12 hours to preaching and about eight additional hours to study

and preparation of religious talks. He concluded that currently he is the Stock Servant of his congregation, and also Area Study Conductor. [16] "The Hearing Officer noted that the registrant was given a hearing before himself on April 9, 1953, and it was recommended that he be classified 1-A. He also noted that on January 13, 1954, the registrant was tried and acquitted in the United States District Court in San Francisco, for violation of the Selective Service Act. He noted that it was his understanding that the registrant's acquittal was predicated upon a procedural technicality."

This is the portion I wish to call to your Honor's attention, the third paragraph on page 3:

"The Hearing Officer noted that the attitude of certain former employees was that the registrant was insincere in his claim as a conscientious objector. He concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity in the registrant's claim. Accordingly, he recommended that the claim of the registrant, based upon grounds of conscientious objection be not sustained."

And I might state the Department recommended that he be not given a conscientious objector's classification.

Now, on August 18, 1955, your Honor, following this recommendation, the defendant was classified 1-A by the Appeal Board. He was ordered for induction on October 21, and it [17] has been stipu-

lated that on November 1, 1955, he refused to be inducted into the Armed Forces of the United States.

That substantially, your Honor, based upon the recommendation of the Department of Justice, is the Government's case. We conclude that this defendant has been allotted every procedural right under the law, and appeals twice now, and the Hearing Officer found him to be insincere, there was basis in fact for his classification of 1-A.

Mr. Brill: We will introduce no evidence, your Honor. If the Government rests, we also would rest.

Mr. Constine: Excuse me. I am sorry, the Government rests following the introduction of that file as evidence, your Honor.

Mr. Brill: At this time the defendant wishes to present a motion for judgment of acquittal in this matter, and the defendant moves the Court for judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and regulations by the defendant as charged in the indictment.

3. The undisputed evidence shows the defendant is not guilty as charged.

4. The denial of the conscientious objector status by [18] the Local Board and the Board of Appeal and the recommendation by the Hearing Officer of the Department of Justice and the Department of

Justice and the Board of Appeal were without basis in fact, arbitrary, capricious, and contrary to law.

5. The report of the Hearing Officer relied upon by the Department of Justice and the Board of Appeal is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and regulations and advises the Appeal Board to classify according to irrelevant and immaterial lines in determining the defendant was not a conscientious objector.

6. The undisputed evidence and the draft board records show that the Local Board deprived the defendant of his procedural rights and due process of law by permitting an unsolicited and malicious and obviously prejudiced and biased statement and letter to be contained in the file in a manner not authorized by law and in violation of the defendant's rights.

I have stated the motion for acquittal in chronological number and I will then review the matter in the same manner as it was reviewed by counsel for the Government.

The file, as indicated previously, indicates that the original questionnaire was filed on April 4, 1951, and at that time the file indicated that the day previous to the filing of the questionnaire, April 3, 1951, this boy registered with [19] the Naval Reserve.

It indicates further, and I am referring to the document No. 26, and I will find the page here. I must apologize to the Court; I didn't think of

preparing a slip index of the documents, although I should have because the numbers in the file are very confusing and I assume the reason for that is because this case has already been before court.

In any event, the file will disclose that after the defendant registered for the draft, which was the day after he joined the Naval Reserve, and on or about September 1, 1951, some six months later, the defendant, having previously thereto studied with the Jehovah's Witnesses, was baptized as a Jehovah's Witness on September 1, 1951.

The defendant's family contains 12 persons, 10 of whom I am informed, and the record will indidate, are Jehovah's Witnesses. His mother and father are Jehovah's Witnesses and had been long prior to the advent of this registrant having registered with the draft.

The file will further disclose, and I am referring now to document No. 24, the letter dated June 23, 1952, which was a letter sent to the draft board, which indicated that after he joined the Naval Reserve and became interested in religion, he found that he could no longer serve in the Naval Reserve and therefore applied for a discharge from the Naval Reserve. That is contained in a letter to the Local Board [20] dated June 23, 1952. He did receive an Honorable Discharge from the Naval Reserve after a hearing before them and that is indicated by several documents in the file, one of which is numbered 17.

The Court: Date?

Mr. Brill: March 6, 1952. That document is a

copy issued by Lt. A. T. Hughes, U. S. Naval Reserve, Assistant Enlisted Personnel Officer, and reading at the lower portion of the document, which is typed in, "He was discharged from the Naval Reserve on 6 March 1952 with Honor for reason of convenience of the Government (conscientious objector)." And giving the authority.

That matter is elaborated on extensively in a document numbered 211, and it is in the file dated October 11, 1954, as the date it was received by the Local Board. However, the original letter from the Department of the Navy, Bureau of Naval Personnel, is dated February 1, 1952. I should like to read a portion of this letter to the Court.

"Inspection of subject man's service record reveals that he enlisted in the U. S. Naval Reserve on 3 April 1951 to serve for a period of four years. It is further observed that when Selby voluntarily enlisted, he obligated himself to comply with and to be subject to such laws, regulations and Articles for the Government of the Navy as are or shall be established by Congress of the United [21] States or other competent authority. There exists no obligation on the part of the Navy Department to discharge Selby prior to the expiration of his contractual enlistment.

"However, the facts and circumstances of subject man's case have been considered by a Board of Officers appointed for that purpose. In view of the information submitted that Selby is apparently sincere in his religious convictions, objecting to combatant as well as non-combatant duty, the Board

recommended that his discharge by reason of convenience of the Government NOT recommended for re-enlistment be authorized. The Board's recommendation has been approved.

"Accordingly, it is directed that subject man be discharged for reason of convenience of the Government, NOT recommended for re-enlistment.

"It is requested that entries be made in subject man's service record and on the reverse side of his discharge certificate, showing reference (b) and (c) and this letter as authority for discharge. Please comply with the provisions of references (d) and (e), thereby insuring that subject man is NOT recommended for re-enlistment and that no entry of this action is made on the discharge certificate.

"It is further requested that the Director of [22] Selective Service of the State in which Selby will reside upon discharge be notified of his discharge from the U. S. Naval Reserve and the reasons therefor. A copy of this notification should be sent to the National Selective Service Headquarters, Washington, D. C."

In other words, the Navy discharged him after a Board hearing, finding that he was a sincere conscientious objector and the Navy itself recommended that he be not re-enlisted in the Armed Forces.

Following discharge from the Navy he filed a number of affidavits which are in the file, all supporting the fact that he had been following this religion conscientiously and faithfully and had been

a sincere member of the religious group from the time he was baptized in September, 1951.

This fact is also found in the resume made by the F.B.I. at the time of the second hearing and before Ernest Williams, the Hearing Officer, which I will refer to subsequently.

Now, we come to this so-called unsolicited letter from some people by the name of Knauss which counsel for the Government read to your Honor. It is dated March 20, 1953.

The regulations governing the manner in which evidence shall be obtained specifically provide for a procedure through which the defendant or the registrant may protect himself. Obviously the Draft Board is not a star chamber for any person who desires by malicious motives or vengeful motives [23] may go in and make a derogatory statement against a registrant without confronting the registrant or without giving the registrant an opportunity to cross examine, or in a manner not provided for by the regulations.

Now, the regulations say that the F.B.I. may go out and make an investigation, but with the knowledge that Congress had that the F.B.I. agents are men who are trained in taking statements and men who would sift and consider all of the statements they would take, but to permit a person to walk in off the street into a Local Board and to make a scurrilous statement against a registrant and then to have this statement typed up and contained in a file is not within the purview of the regulations and the Act itself.

Now, here we have people who obviously were vengeful. Their two sons had gone into the service, and they go into the Draft Board and they say they are very much incensed over the fact that this boy has not been taken into the service. Mr. Knauss has one boy who is in Korea and another one who was 18 last February. Both boys, however, are in the National Guard.

"These people stated that of all the boys called for physical induction at the time of their son are now in the service with the exception of Selby."

These are statements which are unverified. There is no statement they were present when all of the persons originally [24] were inducted, there is no statement that they were present at any time. These are merely statements of persons who obviously were incensed, made with a malicious motive to see that another boy in the block, or in the city, went in because their two boys went in.

They further make statements that when this man's son and Selby were sworn into the National Guard they were both asked whether or not they were conscientious objectors, and both answered "no". It's obvious on its face that this man's statement is untrustworthy because there is nothing in the file which would indicate that either boy went into the National Guard. The facts are that Selby went into the Naval Reserve, which is not the National Guard. However, the statements which are made by a person who is under an emotional strain and stress, such as the Knauss people, are obviously not to be trustworthy in any respect.

It went on to say.

"However, when it became time for induction, young Selby said he wasn't going."

No statement as to when he said it, where he said it, in whose presence he said it, or if in fact he did say it.

"He was going to join the church 'Jehovah's Witnesses' and be smart. He was going to work and make a lot of money like some people did in World War II. He wasn't going to be a fool." [25]

No statement as to when these statements were made, to whom they were made, whether in fact they were made. These are statements which were made by an incensed person who was mad because another boy was not put in the service and their two boys were.

"Mr. Knauss says Selby has a good job, drives a big car and brags about the fact that he isn't in the service and won't be; about the money he is making, etc. Neighbors are getting more incensed by the day as their children are having to go and Mr. Knauss says they are saying that Selby has an 'in' with the Board members and that is why he is not in the Army."

Again, statements made by an incensed, evil-intended person to a Draft Board in order to incense the Draft Board to take him in, referring to some connivance with the Draft Board.

But on top of all of this, Mr. and Mrs. Knauss admit that Selby does go to church, but that he could be a chaplain in the service if he won't fight,

but that he should be in the service, and that he and his neighbors are good and sore about it.

If one statement such as this were allowed to be contained in a file, which obviously must have had some effect upon the Local Board and upon the Appeal Board and upon the Hearing Officer, then hundreds of statements such as this, [26] then we are avoiding, we are doing away with the regulations and orderly procedure and we are having a star chamber proceeding where any person can go in and make any sort of statement, untested, unverified, and have that statement as a basis for conviction of a crime such as is being done here.

The Court: What is the date of that letter?

Mr. Brill: That letter was dated March 20, 1953.

The Court: On the trial of this case in another department, that didn't go before the Judge, did it?

Mr. Constine: Yes, your Honor, it was the reason for that letter that he was acquitted the first time before Judge Hamlin. That's what Judge Hamlin stated, that letter was never considered by the Local Board and went to the Appeal Board. For that reason he was acquitted and that's why we are back the second time giving him an opportunity to answer all the charges and be given his full hearing the second time. That was what counsel was arguing, the reason for his first acquittal.

Mr. Brill: And that letter should have been removed from the file instead of being allowed to be contained in the file.

The Court: I think counsel will admit that.

Mr. Brill: It wasn't removed from the file, it is still in the file and still considered by the Board.

Mr. Constine: Still in the file, but since that time [27] the defendant has had an opportunity, he has been given a full hearing before the Department of Justice, all the charges were explained to him, he had an F.B.I. investigation, and there is no indication that the Appeal Board this time, or the Local Board, has considered this; this is part of the old case.

Now, in the first place, your Honor, there is abundant evidence in this case that he is a 1-A classification and in no way prejudiced by this letter because he had the opportunity himself to appear, to present his side and the Hearing Officer found he was insincere by his conversations with this defendant. That was the basis for his classification.

Mr. Brill: I am informed, your Honor, that Judge Hamlin ordered that this letter—there are two letters—be stricken from the file and taken out of the file as having been obtained outside the authority of the draft procedure. However, it was not; it was used; it was taken to the Appeal Board again, it was considered by everyone; it became part of the file, it was never stricken from the file. As was stated, he was tried before Judge Hamlin.

The Court: Did you appear at that trial?

Mr. Brill: No, your Honor, I did not; another counsel did. However, I have discussed the matter with him.

The Court: The reason I inquire, I am going to ask you some questions. Proceed. [28]

Mr. Brill: Now, we come to the resume of the F.B.I. which was made in accordance with the regulations to be used by the Hearing Officer on the second hearing that was made. No. 230 is the number and it is dated June 13, 1955.

"The registrant"—and this is the F.B.I. report, the resume of their findings—"graduated from Watsonville Union High School in June, 1950. Former instructors had no knowledge of the registrant's religious beliefs or his conscientious-objector claim but advised that the registrant was a person of good character and they believed he would be sincere in his statements.

"The registrant was employed by the Pringle Tractor Company at Watsonville from April 19, 1950 to April 15, 1952. Several persons who were associated with the registrant during this employment, including fellow employees and superiors, advised that they doubt the sincerity of the registrant's claim as a conscientious objector."

In that regard, if the Court please, there have been numerous Circuit Court of Appeal cases, and some in the Supreme Court of the United States which hold that there must be legitimate grounds for a basis in fact and hearsay opinion statements are the same as no statements unless the opinion is predicated upon a subjective finding which can be verified. Hearsay and opinions of persons as to why he did or did not claim to be a conscientious objector to them or what their [29] opinion was is not material; it's not a legitimate basis.

"A supervisor advised that he asked the regis-

trant about his draft status shortly after he was hired and the registrant advised him he was safe for about a year as he was a member of the Naval Reserve."

Now, we go back to April 19, 1950, the time when he first joined the Naval Reserve. So that that statement is a true statement.

"Later the registrant told the supervisor that he was a conscientious objector and would not be called up for service."

This also is verified by the fact because after he joined the Naval Reserve he later was discharged from them and found to be a conscientious objector by the Naval Board.

"One fellow employee stated that when he learned that the registrant was claiming to be a conscientious objector he was very much surprised. He stated that the registrant had never indicated his objections and was a member of the Naval Reserve. The interviewee also advised that the registrant's older brother had been in the Armed Forces. He noted that the registrant joined the Jehovah's Witnesses some time after he had joined the Reserves and prior to the time he was due to be drafted. He stated he did not feel that the registrant was sincere in his objections as they seemed to [30] be too new and preceded too closely his imminent induction into the Armed Forces. Several other persons gave much the same information."

Nothing contained in that file is anything but the rankest type of opinion and hearsay and not based upon fact.

"From April 1952 to October 1952, the registrant was employed at Farmers Cooperative as a parts man. An official of the Cooperative advised that he was somewhat surprised to learn from another employee that the registrant was a conscientious objector as nothing about him would indicate that such was the case. He stated that he did not feel that the registrant was sincere because he appeared to have acquired his objections shortly before he would be drafted."

Here again they are basing their opinion upon the close proximity to the time when he was drafted. That matter was gone into by the Ninth Circuit Court of Appeals in the Dave Schumann case in which the Circuit Court held that mere suspicion or closeness between the time he became a Jehovah's Witness or a minister and the time he was to be drafted could not be the basis, suspicion could not be the basis for classification. I have the Schumann case here, and I am reading from the opinion: "We could find no affirmative evidence which controverts Schumann's claim. There are only the suspicious raised by the fact that Schumann did not begin [31] his religious studies until after he had registered for the draft and by the fact that he had not sought exemption until after the Korean War broke out.

As the Supreme Court has stated, when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary

to the spirit of the Act and foreign to our concepts of justice." And that referring to the famous Dickinson vs. the United States, a case which also arose in this District.

The Schumann case, incidentally, reversed the District Court and on the basis as I have just read.

The Court: What District Court?

Mr. Brill: In this circuit, Judge Monroe Friedman tried it.

The Court: I thought it was myself, that is the reason I inquired. Proceed.

Mr. Brill: I tried this case myself and also handled the appeal.

"Another person connected with the Cooperative stated that the registrant never expressed himself as to religion or the military service. He advised that he had no way of knowing the sincerity of the registrant's objections. A fellow employee stated that one day he asked the registrant about his draft status and the [32] registrant replied, 'I'm not worried about the draft because I'm a conscientious objector.' The interviewee stated that this remark sounded to him like the registrant was using this status as an 'out' to escape the draft and he did not feel that the registrant was conscientiously opposed to military service but that he just did not want to go into the service and would use this as a means to evade it."

Again, mere suspicion and opinion of this man.

"From November 1952 to approximately June 13, 1954, the registrant was employed by the Townsend Electric Company. A person connected with this

company advised that the registrant was discharged because it was learned that he had bought an interest in a gas station and was leaving his work at the Townsend Electric Company to work at the gas station. The interviewee stated that the registrant was earning a salary of approximately $450.00 a month. He further stated that he did not believe the registrant was sincere in his objections to military service inasmuch as it appeared to him that the registrant was an individual very much concerned with making money. He added that it was his opinion that the registrant was 'pretty much out for himself' ".

Again, pure speculation, suspicion.

"The registrant became a part-owner of the Selby [33] Service Station in June, 1954, but ceased being a part-owner in about August, 1954."

And I think this is very important as showing apparently what this boy actually was doing.

"The two registrant's partners are reputed to have asked the registrant to sell his interest in the service station to them because it was their belief that the registrant was not doing his share of the work. The registrant was not able to devote enough time to the service station to satisfy his partners because he was devoting considerable time to the work of the Jehovah's Witnesses, according to an interviewee."

In other words, he, when given the election between giving up his religion and giving up his business, he gave up his business in order to carry on his activities in his religion. So that that would viti-

ate all these statements that he was out for money and that he was penurious as some of these other persons had obviously stated.

"A neighbor advised that the registrant's parents, the registrant and his younger brother are Jehovah's Witnesses but she did not know that the registrant was a conscientious objector. She stated that the registrant's family enjoys an excellent reputation in the vicinity and that the registrant has been assisting in the support of his parents who are elderly. The [34] neighbor considers the registrant a fine, upstanding boy. She stated further that it would be her conclusion if the registrant has registered objections to military, that he would be sincere and that his objections would be based upon religious teachings. Another neighbor advised that registrant's parents are Jehovah's witnesses as are the registrant and his younger brother. He stated that an older brother served in the Army and is not a Witness. The neighbor stated that he could not feel that the registrant is sincere in his objections to military service but feels that the registrant is deliberately trying to 'evade service' ".

Again, merely opinion and suspicion.

"It was the neighbor's opinion that the registrant's mother is very much the dominating member of the family where religion is concerned and that she is counseling the boys. The neighbor stated that it has been his observation that the registrant drives a 1951 Pontiac and appears to be gainfully employed. He stated that it was difficult for him to understand how the registrant can spend as much

time as he does making money so that he can obtain material things when it is his claim that he is opposed to military training and service because of his religious convictions. The registrant's father is reputed to have lost his old-age pension because he was [35] working and did not declare his returns. An interviewee observed that if the family was sincere about their religious teachings, the father could not conscientiously cheat on his old-age pension and the interviewee felt that every member of the family knew what was going on."

It will be observed that before the Hearing Officer this was denied. Now, if this was a fact, the F.B.I. could have gone to the old-age pension department for the State or Federal and ascertained as a fact instead of taking the statement of an interviewee and containing it in here in an attempt to reflect upon this registrant. However, nothing appears in the file except the denial before the Hearing Officer that this is a fact.

"The School Servant and Record Clerk of the Watchtower Bible and Tract Society, Brooklyn, New York, advised from records that the registrant was ordained into the Jehovah's Witnesses as a minister on September 2, 1951, and became a Pioneer on September 1, 1954. However, upon the registrant's request, his Pioneer appointment was terminated on November 1, 1954. In September, 1954, the registrant devoted 106 hours to the Witnessing work of the sect and in October, 1954, he devoted 88 hours to Witnessing activities. Since November 27, 1953, the registrant has been serving as Stock

Servant with the Jehovah's Witnesses congregation at Watsonville. [36]

"The registrant's brother, who is the assistant congregational Servant of the Jehovah's Witnesses Kingdom Hall at Watsonville, made available the registrant's publisher's record which reflects that during the year 1949 the registrant devoted a total of 7 hours to the Witnessing work of the sect. The record reflected no Witnessing activity during 1950, nor during the first six months of 1951. From July through December, 1951, the registrant devoted a total of 27 hours to Witnessing activities. The registrant devoted some time to Witnessing activities during each month of 1952, and during that year devoted a total of 75 hours to Witnessing activities. During 1953 the registrant also devoted some time each month to Witnessing work, and the total time devoted to such activities was 72 hours. During 1954, in addition to the time devoted to Pioneering activities in September and October, the registrant devoted an additional 78 hours during the year to ministerial duties.

"References generally advised that the registrant has been reared in the Jehovah's Witnesses faith and they believe he is sincere in his religious beliefs and in his objection to military service. The registrant is reputed to be engaged in the construction of a church of another denomination at the present time and hence is not able to devote as much time to Witnessing [37] activities as previously.

"An acquaintance of the registrant advised that the registrant actually encouraged him and another

boy to enlist in the Naval Reserves. The interviewee recalled that in April, 1951, the registrant accompanied him when he went to enlist in the Reserves. He recalled that there was one question on the Naval Reserve application which asked the applicant to state whether or not he was opposed to armed service or was a conscientious objector. The interviewee stated that the registrant answered that question in the negative. The registrant agreed to attend two weeks' training in the Naval Reserves but did not appear for the training. The interviewee was of the opinion that the registrant did not want to leave a good-paying job and for that reason failed to appear for the training. The interviewee stated that after the training period was over, the registrant advised him that he would rather go to jail than go into the Army. The interviewee advised that it is his personal opinion that the registrant is out for himself and is primarily interested in earning money."

Here again we have opinion and conclusion.

"The registrant was arrested on August 20, 1953, for refusal to submit to induction. At that time the registrant stated that he joined the Naval Reserves at the [38] insistence of friends who were also in the Naval Reserve. He stated that he was not opposed to military service in April, 1951, when he joined the Reserve, but had been opposed since June, 1951.

"Records of the United States Naval Reserves, De Lavea Park reflect that the registrant was received by the Naval Reserves on April 3, 1951, and

was dropped from the rolls on July 26, 1951, for 'lack of attendance' ".

Now, after that last statement the record is definite in this file, there being several statements by the Naval Reserve itself, that the reason he was dropped from the roll is after a hearing before a Naval Reserve Board in which they found him to be a sincere conscientious objector and that he was not dropped from the rolls, not taken from the rolls of the Naval Reserve because of a lack of attendance. The inference, of course, is that a reflection upon the registrant and the defendant is attendant in this resume rather than a declaration of the true facts.

After this resume the Department of Justice held a hearing, and here again the Department of Justice on June 13, 1951—the Hearing Officer states at the bottom of the page 2 in this last report he added that "* * * though Jehovah's Witnesses are not pacifists, they are opposed to war in any [39] form and regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed' ".

There have been innumerable decisions, both in this circuit and in other circuits, and it is almost—well, it is now the law that the mere fact that a man is not a pacifist does not prevent him from being a conscientious objector.

If your Honor wishes cases on that, I am sure your Honor is familiar with them; your Honor has had a number of these cases before him, and I can certainly supply them.

The rest of the report is merely a reflection of the suspicions and the innuendos but not based upon the facts whatsoever. The Hearing Officer noted that the attitude of certain employees was that the registrant was insincere. Attitude itself is mere speculation, mere suspicion and is not a factual matter upon which the Board may predicate a finding such as made here.

Then in conclusion, he concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity.

The file is complete. There is a conscientious objective form. The file is complete with affidavits and which support the fact that he is a member of this sect, that he is conscientiously opposed to participation in war. This boy submitted himself twice to be imprisoned; once when he [40] insisted upon a release from the Naval Reserve, which the Reserve was not under an obligation to give him, and if he refused to serve he could have been court-martialled before the Naval Reserve; and once when he submitted himself to this court, that is, a department of this court, and subjected himself to a possible prison incarceration; and again at this time.

Now, what other form of proving sincerity there is I don't know and what the Hearing Officer was looking for in this case I don't know. There is no tangible and what is called legitimate evidence to predicate a basis in fact for a 1-A classification in this case.

Counsel, when he was arguing the matter, pointed

out to the Court that at some time or another the registrant had asked for a ministerial classification and said he wouldn't take a 1-O classification. There have been a number of decisions—I don't believe in this circuit—but in other circuits that it is the duty of the Draft Board to place the registrant in his proper classification. His personal desires are of no moment. The regulations provide that if in fact a man is a conscientious objector, the mere fact that he says he wants to be a minister and not a conscientious objector doesn't in any way change the fact that the Draft Board and the Appeal Board must place him in a conscientious objector classification if they find that that is the fact and [41] that is the class in which he is to be put.

These boys are not represented by counsel. These cases are not to be handled and considered as though the registrant and the defendants are represented by counsel. It is for that reason that Congress in its wisdom regulated this matter and provided that the Draft Board and the Appeals Boards shall place the boy in his proper classification and that he may not waive that right merely by saying "I don't want to be a conscientious objector, I want to be a minister." It is the duty of the Boards themselves to do it.

In closing I wish to point out that now that we have a rather large body of law on the question of these cases, involving these cases and the courts are no longer rubber stamps for the action of the Appeal Board or for the Hearing Officer, the courts have an obligation to search the file and if there is

no basis in fact, but merely, as the Schumann case says, "speculation and suspicion," then it is the court's duty to find that there is no basis in fact unless it be actually shown to the court, and we submit that in this matter the defendant should be acquitted as he was in the previous trial, if for no other reason than there is contained in this file some evidence which got into the file erroneously in the first place and was never removed and is prejudicial to the defendant.

(Short recess.) [42]

Mr. Constine: Your Honor, I have a few comments to make to the Court, if I may, in closing.

The Court: Just a moment.

Mr. Constine: Yes, sir.

The Court: Did I understand you submitted your case?

Mr. Brill: Yes, your Honor.

The Court: Now, have you submitted your case?

Mr. Constine: Yes, your Honor. These comments are in the form of closing argument to counsel's argument, yes, sir. We have no other evidence to present. I understand the defendant does not wish to take the stand and the defense is submitting their case on the record.

The Court: Then the case is submitted on both sides?

Mr. Constine: Yes, your Honor. May it please your Honor, I merely wish to answer some of the comments of counsel because I think they require answering.

So far as this man's Naval Reserve status was

concerned, the Navy found that his activities did not entitle him to Reserve status and they discharged him honorably. Now, in the reports that are in the file it is stated that the Navy did not believe he was a fit subject to re-enlist. Now, the right to re-enlist is a privilege, your Honor. It is not the same as being drafted. The Navy did not say this man should not be subject to draft, they said, so far as the Navy is concerned, he should not be entitled to re-enlist because [43] the re-enlistment voluntarily entitles the person to certain privileges that the drafting of an individual does not entitle him to. And he was discharged for reasons of convenience to the Government. He received an Honorable Discharge. There is no indication what kind of a hearing the Navy held except this defendant's own statement that he was religiously opposed to being in the service, opposed to war, and he received his discharge, and they notified Selective Service of that fact so that orderly processes of selective service then could commence.

Now this defendant, I will point out to your Honor, today is not a Pioneer Minister nor was he a Pioneer Minister when he appeared before the Hearing Officer. That was in 1954. He has given up those duties of over a hundred hours a month. He no longer performs the services of a minister of the congregation of Jehovah's Witnesses, and if this defendant is sincere——

The Court: Where is the testimony as to that?

Mr. Constine: That is in the Hearing Officer's report, your Honor, based on what the defendant

stated at the time, and based on counsel's argument. I shall read that to you for the record.

"The registrant testified that during 1954,"——

The Court: What was the date?

Mr. Constine: This is the date of June 7, 1955, just [44] prior to his classification. This is the report of the Department of Justice, of Mr. Williams, and it states on page 2 of this report as follows:

"The registrant testified that during 1954, he 'Pioneered' in Jehovah's Witnesses ministry for about two months."

The "Pioneer" is the status of serving over 100 hours a month.

"He contended that he was unable to serve a longer period of time as a 'Pioneer' because it was necessary for him to make a secular living. He stated his ambition in life is to become a 'Pioneer Minister' and earn a living by part-time work. He stated that because of his religious training and belief, he could not engage in non-combatant military service,"—he says that now although previously he said he would be willing to accept that kind of a classification.

"He stated that he has dedicated his life to Jehovah, and that any type of military service would be inimical to his principles."

Now, and this is important, your Honor: "He told the Hearing Officer"—Mr. Williams—"that if he were classified 1-O"—that is, if he were to receive a conscientious objector classification, if it were given to him—"he would be unwilling to en-

gage in civilian work for the government, because to [45] perform such a non-military service would be 'breaking his covenant with God and would be a compromise of his covenant.'"

He says further that he would not even be willing to accept civilian work in lieu of induction.

Now, your Honor, there are some very significant things in this file which I again wish to call to your attention. But first I would like to say this: This resume that counsel has referred to, the F.B.I. report, he said it contains hearsay. It does; it contains both hearsay favorable to the defendant and unfavorable to him. That is because the regulations provide that the Government shall conduct an inquiry and this inquiry is into the defendant's sincerity, his beliefs and his reputation in the community, and therefore, the F.B.I. doesn't give an opinion; it merely states what it finds from interviewing these individuals. A copy of that resume is given to the defendant before he ever appears before the Hearing Officer. This is a new procedure so that he cannot claim the Hearing Officer has something in his possession that he does not have. After he is given the resume he then appears before the Hearing Officer and the Hearing Officer conducts the hearing. This defendant appeared as well as his father with the documents that the Hearing Officer had in his possession.

May it please your Honor, I would like to state this: Back in April of 1951 this defendant was in the Naval Reserve. [46] He then is classified 1-A. Within a short period after that classification, he

then becomes a Jehovah's Witness opposed to war in any form, although just two months previous he was willing to serve in the Naval Reserve of this Nation.

On his conscientious objector questionnaire, which was submitted in 1951, he is asked this question: "Have you ever been a member of any military organization or establishment, etc.?" He says this: "Early in 1951, along with some school buddies, I joined in the Naval Reserve at Santa Cruz because it seemed the only thing to do."

I merely point that out to your Honor, the only thing to do at that time was to prevent himself from going in the service. But he found a better thing, and that was to become a member of the sect of Jehovah's Witnesses.

I would like to read again the opinion of the Hearing Officer, which counsel did not read to your Honor. This is again in the letter of June 7, 1955, to the Appeal Headquarters.

"The Hearing Officer noted that the attitude of certain former employees was that the registrant was insincere in his claim as a conscientious objector." And this is the important thing.

"He concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity [47] in the registrant's claim."

That is the opinion of Mr. Williams, one man's opinion, but he is the Hearing Officer and it is his function to make an opinion, to give an opinion

after a full hearing as to whether he believes the man was sincere or not.

Counsel has stated to your Honor that that sincerity, that attitude cannot be considered by the Hearing Officer as a standard.

I might state to your Honor the Supreme Court of the United States has held contrary, as well as the Circuit Court for the Ninth Circuit in two very recent cases, which I must cite to your Honor at this time. This is the law in the Ninth Circuit. Certiorari has been denied by the Supreme Court. The case is White vs. the United States, 215 Fed. 2d 782, decided by the United States Court of Appeal for the Ninth Circuit, September 14, 1954, and I wish to read from page 785 of that opinion in discussing whether a man is sincere or not is the standard upon which to classify.

"* * * the Local Board initially, and the Appeal Board subsequently, were called upon to evaluate a mental attitude and a belief. It is plain that when such matters are to be determined and passed upon, the attitude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as [48] to the extent and quality of his beliefs. The Local Board, before whom the registrant appeared, had an opportunity surpassing that available to us or the Appeal Board itself to determine and judge as to these matters."

This case held, your Honor, the White case, that the Local Board, if they found the defendant was insincere, that was a proper standard upon which

to deny the conscientious objector claim. But we have a later case that goes even further. I might say that certiorari was denied in this White case by the Supreme Court.

But the leading case in the United States today, may it please your Honor, is Tomlinson vs. the United States, 216 Fed. 2d 12, again decided in the Ninth Circuit on September 15, 1954. The opinion was written by Judge Pope; Stephens, Bone and Pope were the Judges presiding. Certiorari in this case has now been denied by the Supreme Court. I would like to read from page 17 of that case, because we have the same situation here where the Hearing Officer found the defendant to be insincere, and the question is that a standard basis upon which to deny him a classification.

The Court: Would you be good enough to read the syllabus?

Mr. Constine: There is no point raised in the case, your Honor, as to—this was before the man was actually [49] given a complete written summary of both unfavorable and favorable material in the F.B.I. report. The case said that the summary given to this defendant in this case was sufficient. We don't have that issue here, because he has been given the complete summary now of both favorable and unfavorable material.

The Court: After a jury trial?

Mr. Constine: Well, this was after a court trial; the first time was a court trial and then the whole procedure started again and this time he was given

everything the F.B.I. had. This is what the case said:

"Action by Selective Service Appeal Board in classifying member of Jehovah's Witnesses in Class 1-A-O, as person available for non-combatant service,"—in this case they gave him a non-combatant service classification—"rather than in classification 1-O"—which is a full conscientious objector classification—

"as person opposed to both combatant and non-combatant service, was not without basis in fact."

"Objection on religious grounds to any assignment which would take registrant away from missionary activities, such as even fighting forest fires or building roads,"—this was a different case—"is not recognized * * *"

And then the case says this: [50]

"Report of Hearing Officer was properly made primary basis upon which Selective Service Appeal Board classified registrant."

And I think I should read that entire paragraph to you about the Hearing Officer's report.

"A Board or body called upon to determine to what extent and how far an individual's conscientious objections go, may well have great difficulty in coming to a conclusion."

Because the Board must figure out what's in the man's head.

"Surely the Board is not concluded by the mere assertion of the registrant."

And this is contrary to what counsel says, your Honor.

"Attitudes and demeanors which develop at the time of such a person's personal appearance may well be the controlling factors. In this instance it is plain that the Appeal Board's conclusion was based primarily upon the report of the Hearing Officer. Such a report may furnish the basis in fact which supports the Board's action. * * * Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal."

In other words, the White case says sincerity is a test, and the Tomlinson case says the report of the Hearing Officer [51] finding lack of sincerity is and may be well the basis for the classification of 1-A. And I repeat again Mr. Williams found, he concluded that there was an absence of sincerity in the registrant's claim, and I think that is quite evident from the record in this case. When he first filed his questionnaire he made no claim of conscientious objection; he made no claim he was a minister; he was in the Naval Reserve. Within a few months after his classification of 1-A he then becomes a complete conscientious objector. He then becomes a minister, he claims. However, at the time of this indictment he had given up his ministerial duties. However, he goes on to say, this defendant, in his file, that even if the Board were to give him a 1-O classification, he wouldn't perform civilian work in lieu of induction.

Your Honor, this defendant's rights procedurally have been zealously protected by the District Court, by the Appeal Board and by the Local Board, and

it is the opinion of the Department of Justice, through its Hearing Officer, Mr. Williams, after a full hearing, that this defendant was not sincere. He was acquitted because of the procedural defect which has now been corrected. He has been given a complete copy of the F.B.I. resume, he has been given every right the Selective Service Board entitles him to, and it is not for this court to have a complete hearing again as to whether he is a conscientious objector; it is for your Honor to determine [52] whether he has been given his rights under due process and whether there was a basis for the Appeal Board's classification.

I might say there is substantial basis in fact for the man's classification as 1-A, and I cite in support of the Government's position the cases of White and Tomlinson vs. the United States in which certiorari has been denied. That's an accepted test today.

We will submit it, your Honor.

Mr. Brill: I want to point out to your Honor that counsel has meticulously avoided the issue of whether or not the documents which we referred to as the Knauss letter is properly in the file. I am of the opinion that that is a very important procedural matter which could not and is not and has not been corrected in any way. That scurrilous letter, maliciously intended, is still in the file, remained in the file and was seen by each of the officers and the courts who looked at the file on this second presentation.

Furthermore, I think that when your Honor reads

the White and Tomlinson cases, your Honor will find that what counsel maintains is not the law. If that were so, then the only thing that the Hearing Officer need state is that on such and such a date I had a hearing and I find that this man in insincere. If all that is necessary is the conclusion of the Hearing Officer, then why go through three pages or [53] four pages of findings in the matter?

The law doesn't provide that the Hearing Officer's conclusion is the basis in fact; there must be evidentiary basis in fact. As is said in the Sugurla case decided by the United States Supreme Court, there must be a legitimate basis in fact for a finding that a man is not a conscientious objector when he has made out a prima facie case and we submit that in this case there isn't one iota of legitimate evidence that can be called legitimate evidence in this file.

I wish further to point out that these statements or the innuendos made by counsel for the Government as to the finding of the Naval Reserve Board was not quite accurate. The Naval Reserve Board did not say that for the convenience of the Government this man is to be discharged. They said that we had a hearing before a Naval Board and we came to the conclusion, after evidence was presented, that this boy was a conscientious objector and therefore we give him an Honorable Discharge and we recommend that he not be re-enlisted in the Reserve or in the United States Armed Forces. That was the finding made back in 1952 after a hearing before the Naval Reserve Board.

We submit there should be a finding of not guilty in this matter, your Honor.

Mr. Constine: Your Honor, we can go on and argue this case until the afternoon. However, the cases speak for [54] themselves and as to the law, and we will submit it.

The Court: Well, you won't submit it at this time. This is a very unusual case. The cases do not disclose, if they do, I haven't run across any case where there is a jury trial and a jury verdict.

Mr. Constine: That is not the way it happened, your Honor. There was a court trial and a court decision.

The Court: Was it a jury trial or a court trial?

Mr. Brill: No, a court trial.

The Court: Did you present that case?

Mr. Constine: No, but I was present during——

The Court: Who presented that?

Mr. Constine: Mr. Foster, your Honor, but he was ordered for induction subsequent to the first trial. This is not the same order for induction.

The Court: I understand that fully. Another court tried this case.

Mr. Brill: That's right, your Honor.

The Court: And I want to begin at the point, if I have any conception of my duty here, we will begin this trial after that trial was concluded.

Mr. Constine: That is correct, your Honor.

The Court: And I will consider only the testimony from that date on in relation to this record.

Mr. Constine: That's right, your Honor. [55]

The Court: Now, then, I am going to be fully

advised, if I am in doubt. The law is sketchy here and we must reason it out, and we will take an adjournment until 2:00 o'clock and be prepared to argue, both sides, fully. I will try and dispose of it. Take an adjournment until 2:00 o'clock.

(Whereupon an adjournment was taken in these proceedings until 2:00 o'clock P.M. this date.)

Afternoon Session, Monday, August 27, 1956
2:00 O'Clock P.M.

Mr. Constine: Your Honor continued the matter for further argument until 2:00 o'clock. I suppose Mr. Brill has a statement to make to the court at this time. Do you have any further argument, Mr. Brill?

Mr. Brill: Yes, I have prepared something further in accordance with the Court's wishes.

The Court: Proceed.

Mr. Brill: This merely supplements, your Honor, the law that I furnished the Court this morning as to the sufficiency of the evidence in this case. This question has been determined in a case of the United States vs. Close, 215 Fed. 2d 439 in the Seventh Circuit in which the court had this to say:

"Nor do we believe that the F.B.I. report on this defendant furnished an evidentiary basis for the denial of the exemption claimed by the defendant. The F.B.I. report described interviews with various persons whose views varied as to the sincerity of the defendant's claim for exemption as a conscientious objector. But the reasons for the opinions expressed in the interviews were not shown. As

the Court said of such unsupported opinion in Annett vs. United States, 10 Cir, 205F2d 689, 691; 'to merely state that he does not consider him sincere [57] without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence'."

On the other point that the defendant waived his claim to a conscientious objector by saying he woudn't accept civilian work, the court in this same case had this to say:

"Nor do we find merit in the contention that the defendant abandoned his claim to conscientious objector status by appealing only on the denial to classification as a minister. As the court said in Pine vs. United States, 4 Cir., 212 F. 2d 93, 98 'it is absurd to assume that appellant intended to abandon his claim to exemption as a conscientious objector because he sought by his appeal the more complete exemption allowed ministers of religion * * *' Memorandum No. 41, issued November 30, 1951, by the Selective Service System Headquarters, as amended August 15, 1952, expressly provides that an appeal by a registrant solely on the basis that he is entitled to ministerial status does not constitute withdrawal of his claim as a conscientious objector. Jewell vs. United States, Sixth Circuit 208 Fed. 2d 770, 771."

This same question was raised in a case I just completed in the Southern District of California, Northern Division in Fresno before the very learned Judge Gilbert Jertberg. We had the same situation where a Hearing Officer concluded that con-

scientious objector claim had not been supported. I [58] am reading from the decision made by the court, the opinion rendered by the court.

"The Hearing Officer concluded that defendant's claim as a conscientious objector was not made in good faith. The crucial question in this case is the sincerity of the defendant in his claim that he is a conscientious objector. His objective acts can and must be considered in determining his sincerity. The transcript discloses that the defendant consistently claimed his status as a conscientious objector from his initial contact with the Local Board to the date of his indictment. The fact that some of his neighbors, school associates, fellow workmen and employers were not aware of his belief does not impune the integrity of his position or sincerity of his belief. The fact that he once stated he became interested in Jehovah's Witnesses in 1950 and on another occasion he stated his interest developed in 1951 and that later he stated that he was a member of the sect since childhood, does not impune the fact that he was a conscientious objector when he filed his claim for exemption on that ground with the Local Board on January 5, 1951.

"I have found nothing in the record incompatible with the defendant's claim that he is a conscientious objector and the court must find that the evidence [59] presented is insufficient to sustain a conviction."

This was decided August 13, 1956 in Criminal Case 3387 ND in the Southern District of California, Northern Division.

In this case, as well as the one at bar, neighbors and other persons made the claim to the F. B. I. that they doubted the sincerity of this boy because he became a Jehovah's Witness to avoid the draft. But those opinions, those statements unsupported by any objective facts are, by the case I have just cited, U.S. vs. Close and other cases that have been decided in the past, purely conclusions of the person and without support in fact and do not rise to the dignity of testimony.

Again I wish to reiterate that this matter was before Judge Hamlin who found this defendant not guilty. This matter was determined by the Naval Reserve Board, found this man to be a conscientious objector. There isn't one scintilla of evidence in the entire file which would in any way impune this boy's claim to be a conscientious objector. That being so, this Court must find that there is no basis in fact for the classification of 1-A and must find the defendant not guilty.

We submit the matter.

Mr. Constine: May it please your Honor, we have no quarrel with Mr. Brill's citations. They don't apply to the case at bar. Mr. Williams, in his report of the [60] Department of Justice does not rely solely upon any statements made by the witnesses contacted by the F.B.I., but relies on his own appraisal of this defendant following a personal interview of he and his father.

We have made no claim that this defendant has waived his rights because he will refuse to accept work, civilian work in the event the Board would

even give him a 1-O classification, but certainly his actions, his activities, his statements can be considered to be his intent and what his belief is.

Thirdly, the case cited by counsel in Fresno, the one he tried, the Judge stated, I just heard counsel read that the defendant had consistently maintained his position since his initial contact with Selective Service. From the initial contact of this registrant, your Honor, he made no claim he was a conscientious objector, he made no claim that he was a minister; he filed his classification questionnaire and said he was a member of the Naval Reserve. It was only after he was classified 1-A that he then embraced his parents' religion and he had been subjected to that religion for many years. But it was the 1-A classification which made him a Jehovah's Witness, he says. He admits that, and then he withdrew from the Naval Reserve. I think that fact alone can be considered to determine this man's insincerity and his integrity.

However, your Honor, I wish to point out a few things to [61] you. From the date of his second—from the date of his acquittal, what has transpired since the acquittal, so far as this man's record is concerned. Let's take from the time of his acquittal to the present. He has been afforded every procedural due right. He has had a second appeal, he has had a second hearing before Mr. Williams and he is found to be insincere.

Now, may I state this to you, your Honor. In his special form for conscientious objector, the written statement filed by this defendant after his first

acquittal and before the Appeal Board he says that "Explain how and when and from whom you have received your training." He says, "By having a Bible Study in our home from 1949 onward." He says he has received instructions from 1949 in his faith and yet in 1951 he joined the Naval Reserve. He had no scruples against engaging in the Armed Services at that time, but from the time he received his 1-A classification, that's when his scruples commenced, from the time he knew he was subjected to the draft, that's when he said he was opposed to being in the service.

May your Honor please, there is another interesting fact here; that he appeared before the Local Board, this is the second time now after the first acquittal, in October of 1954. At that time he states he is a Pioneer which means in the Jehovah Witness faith that he puts in over 100 hours of work a month. That is the ministerial classification among the Jehovah's Witnesses. At the time he appeared before the Board he is a Pioneer, but in November, 1954, following his personal appearance he gives that up, he no longer is a Pioneer. He uses that two-month period to appear before the Draft Board and then once he appears and says he is a Pioneer, he then withdraws from that particular activity and goes back to full-time employment, giving ten to twelve hours a month to his religion, which is not an unusual thing. Most people who follow any particular faith may well put in ten hours a month merely going to church, to whatever congregation they belong. So I might say

the Board has this to consider: that when he makes a personal appearance he is a Pioneer; the moment his personal appearance is over he drops his Pioneer activities.

The Court: Where is it indicated that he dropped that?

Mr. Constine: That is indicated, your Honor, in the June 7, 1955, report subsequent to this hearing.

The Court: What report?

Mr. Constine: Of the Department of Justice before Mr. Williams. Now, this is in June of 1955, and I'll read this for the record.

"The registrant testified that during 1954,"—the year before, and by the way, this is all subsequent to that first trial—"he 'Pioneered' in Jehovah's Witnesses [63] ministry for about two months. He contended that he was unable to serve a longer period of time as a 'Pioneer' because it was necessary for him to make a secular living."

In other words, he says he couldn't remain in that activity because he wanted to have a full-time living, make a full-time living, which I think most people want to do. But he goes on to say this: "He told the Hearing Officer that if he were classified 1-O"—if he received his conscientious objector classification now—"he would be unwilling to engage in civilian work for the government,"—he wouldn't take the work—"because to perform such a non-military service would be 'breaking his covenant * * *' ".

So what he says is this: I am not a minister, I am following full-time employment, but if you order

me to go to work instead of going in the Army, I won't go to work anyway because I don't want to give up my good job. I think based on that——

The Court: What job?

Mr. Constine: Well, he states here what his actual employment is. He was presently employed at that time as an apprentice carpenter, at the time that he appeared before Mr. Williams. And then again I will read this, I will read it for counsel's benefit. Mr. Williams says this:

"He concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by [64] offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity in the registrant's claim."

And that, your Honor, is not a bare statement, unsupported by the record. That is supported by this defendant's activities from the very time he came in contact with the Selective Service.

Again I wish to cite to your Honor not the Seventh Circuit cases, but two cases recently decided in this District, in this Circuit, I should say, in which certiorari was denied by the Supreme Court. And contrary to what Mr. Brill says, the White case, White vs. the United States, holds that it is plain when such matters are to be determined and passed upon, that is, the attitude and the demeanor of a person in question, his attitude and demeanor is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant.

The Court: Let us pause there for a moment.

What does this record disclose in relation to his attiude and his demeanor?

Mr. Constine: Your Honor, that is evidenced by his actions.

The Court: What actions?

Mr. Constine: That when he first filed his questionnaire he made no claim of conscientious objection, he made no claim [65] he was opposed to military service, and he was in the Naval Reserve.

The Court: That is in 1951.

Mr. Constine: That's right.

The Court: Well, we are going back.

Mr. Constine: Well, your Honor, it is the entire record which indicates a man's conduct and actions. He has not taken the stand so we cannot question him. All we must rely on is the written record, and Mr. Williams said that from his contact with the man, following the full hearing with the man and his father, he was convinced the man wasn't sincere in his beliefs. That was Mr. Williams' subjective feeling.

The Court: Based on what?

Mr. Constine: On his appraisement of this man's character and demeanor when questioning him, your Honor.

The Court: Well, there is an absence of both in this record.

Mr. Constine: Now, your Honor, we don't believe there is. We believe from these various statements this defendant has filed concerning his conduct from the beginning——

The Court: All right, point it out.

Mr. Constine: Again I will refer to the fact that he made no claim of conscientious objector when he first registered.

The Court: In 1951. [66]

Mr. Constine: In 1951. After he registers he is in the Naval Reserve, classified 1-A, then he embraces the faith of his parents, although he said he had been subjected to that faith for years. He then states in a letter to the Board in 1952 that he would be willing to accept the non-combatant service. He then states after that, no, he wouldn't accept it, he wants a minister's classification, and for two months he serves as a minister in 1954 when he appears before the Local Board. When that local appearance is finished, then he gives up his minister's work and goes back to full secular employment.

I think all those activities of this defendant, coupled by the fact that Mr. Williams, in his hearing, and the man can only express what he feels when he listens to a witness, just like a jury, he either believes them or he doesn't; from the man's demeanor Mr. Williams says he believes this man is insincere and he has not sustained his proof.

There is no requirement that he sets forth his mental processes in a writing in that conclusion. He sets forth the whole man's history, he sets forth how he came to him, sets forth what the man's acquaintances have to say, and then he gives his evaluation.

The Court: That is Williams' report?

Mr. Constine: Yes, your Honor.

The Court: Read it in its entirety. I haven't seen it. [67]

Mr. Constine: All right.

Mr. Brill: I think the Court should be apprized that this is not Williams' report.

Mr. Constine: Oh, no. This Department of Justice letter is prepared almost verbatim from the report of Mr. Williams. It is word for word. If there is any question, I have Mr. Williams' report right in my office, and I will be happy to produce it now if there is any question about that.

Mr. Brill: Counsel, I was just asking you to point out to the Court that this is not Mr. Williams' report, this is signed by the Department of Justice.

Mr. Constine: That is correct, but it states almost verbatim, word for word, the report of the Hearing Officer.

The Court: That isn't the best evidence.

Mr. Constine: If counsel has no objection, I will get that report and produce it. I have got it right on my desk, because that is what this letter is based on, it says so.

The Court: That letter isn't the best evidence.

Mr. Constine: Your Honor, this is the letter that the regulations require they put in the file.

The Court: You are talking about the Williams report?

Mr. Constine: This is the letter that sets forth what is contained in Mr. Williams' report.

The Court: It isn't the best evidence; the original is the best evidence. [68]

Mr. Constine: I will get a copy of that report.

The original is in the Appeal Board, and we have a copy of that report in our office files, the report of Mr. Williams, which I will get in a matter of 30 seconds. I imagine counsel will object to my introducing that, because this is the only document permitted to be introduced. If counsel has no objection, I will get it.

Mr. Brill: I merely called to the Court's attention that counsel was, perhaps unintentionally, advising the Court that this is Mr. Williams' report when it was not Mr. Williams' report. We have no argument that there is a report issued by Mr. Williams to the Department of Justice. I haven't seen it. I don't know whether it is verbatim or not.

The Court: You want to see it?

Mr. Brill: I have no interest in the thing, really, because the regulations provide that the only evidence that can be produced before a court in order to convict this defendant is that which is contained in the file itself.

Mr. Constine: That's right.

Mr. Brill: We haven't seen Mr. Williams' report and we have no way of knowing anything about it. That burden is upon the Government.

The Court: I realize that.

Mr. Constine: And the regulations provide that it is the recommendation of the Department of Justice, based on the [69] Hearing Officer's report, that is placed in the file.

The Court: The answer to that is that under the rule it isn't the best evidence.

Mr. Constine: Well, it is the only evidence, your

Honor, that is permitted unless counsel will agree to permit me to put the actual report in, it is the same thing.

The Court: Get the report here.

Mr. Constine: Might we have a recess for a few moments so I can get a copy of the report?

The Court: Recess.

(Short recess.)

Mr. Constine: May it please your Honor, I have at this time a copy of the report of the Hearing Officer, Mr. Williams, which I stated states in substance what is contained in the Department of Justice letter. I understand counsel has no objection to the introduction of this document.

The Court: A copy?

Mr. Brill: Yes, your Honor.

Mr. Constine: May it be marked Government's Exhibit in evidence?

The Court: It may be admitted and marked.

The Clerk: Government's Exhibit 2 admitted and filed in evidence.

(Whereupon the report of Mr. Williams above referred to was admitted in evidence and marked Government's Exhibit 2.) [70]

Mr. Constine: May it please Your Honor, the first portion of this report contains the resume of the F.B.I. report that was given to counsel—rather, that was given to the defendant and that is contained in the Department of Justice letter. It's word for word, because it is the actual resume that was given to the defendant. If I may, I will read from the actual hearing and what took place before

Mr. Williams, which is in substance what is contained in our letter in the file.

"The registrant admitted receiving a copy of the resume, and made several objections thereto, which objections will be discussed later in the report.

"Hearing:

"Attention is invited to the fact that the registrant was given a hearing before this Hearing Officer on April 9, 1953. On that occasion it was recommended that the registrant be classified 1-A. On January 13, 1954, he was tried and acquitted in the United States District Court in San Francisco, for violation of the Selective Service Act. It is understood that his acquittal was predicated upon a procedural technicality."

The Court: Just a moment. What was that procedure?

Mr. Constine: That was the fact that that letter, rather, there was a memorandum of the report of this man's neighbors concerning the man's insincerity. That memorandum [71] was never considered by the Local Board but was forwarded to the Appeal Board, and under the regulations the Appeal Board should not have had anything before it, under the regulations, that the Local Board did not have. Therefore, he was acquitted because the Appeal Board had testimony of certain individuals that the Local Board had never considered when they classified the man 1-A, although from a practical point of view the defendant would not have benefited by that letter, certainly. Nevertheless, it

was not in accordance with the rules and regulations and he was not afforded his due process and Judge Hamlin acquitted him. This time there was nothing submitted to the Appeal Board that the Local Board did not have under the regulations.

The Court: Speaking of the regulations, to what are you referring?

Mr. Constine: Well, there is a procedure for taking an appeal and I might say that the entire record of the Local Board is forwarded to the Appeal Board. This time the Appeal Board received this document which had not been a part of the registrant's file as a point of time when the Local Board considered his classification. See, this document that, of course, counsel believes was quite prejudicial to the defendant which, in fact, it was, was never considerd by the Local Board. It came in after his hearing in point of time. He had been classified by then. [72]

The Court: The reason they didn't consider it was that it wasn't filed in time?

Mr. Constine: Well, it was not filed. It was just not filed, it was not filed in time, frankly, that's right.

The Court: What time elapsed, if you know?

Mr. Constine: Yes, I do. Now, this defendant was finally—there were a number of classifications, but his last classification by the Local Board was on November 3, 1952, when he was continued in 1-A. On January 8, 1953, he appealed. The file went to the Appeal Board. It was not until March 20 that

this memorandum was submitted to the Local Board. It was actually two months after the time the appeal commenced, so the Local Board never had it before it back in November of 1952. Therefore, it went up to the Appeal Board without going through the Local Board's proper channels, and according to Mr. Williams that was the reason for his acquittal. That was according to Selective Service, too, that the regulation, by the way, is set forth in here. I think we should read that for the record, too.

This, by the way, Your Honor, is on Your Honor's file, No. 9 in Your Honor's file. It's a letter from Selective Service to the Local Board. It's as follows:

"The case of subject registrant was recently tried in the Federal Court. Registrant was found not guilty. The court rendered no written opinion [73] in this case and reason for its findings was based upon a procedural error in the handling of the case.

"It seems that two memoranda"—an original and copy—"which were furnished by neighbors of registrant to the Local Board were forwarded to the Appeal Board after the case had been forwarded on appeal. There was no indication that the two memoranda received by the Appeal Board had been considered by the Local Board subsequent to the case being forwarded on appeal." Which is correct. I might state it hadn't been because it came in afterward.

"The failure of the Local Board to consider this

information is not in accordance with Section 1626.24(b) of Regulations.

"It is suggested that the Local Board reopen the case considering all information that the cover sheet now contains." And so forth.

So this did come in after the case had been forwarded on appeal. That is what Mr. Williams was talking about when he refers to the procedural error.

May I go on, Your Honor?

"The registrant personally appeared at his hearing on March 10, 1955, accompanied by his father who served as a witness. The following facts were adduced at the hearing: [74]

"The registrant made the following objections to the resume:"—In other words, he had been provided with the resume of the F.B.I. investigation, and he made these objections:

"He stated that although a majority of the former employees opined that he was insincere and was trying to evade the draft, it was not necessary for him to evade the draft inasmuch as he was in the Naval Reserve. Subsequently, the Navy gave him an Honorable Discharge because of his religious beliefs. He called attention to the fact that the resume stated that he was discharged from the Townsend Electric Company because he had purchased a part-ownership in a service station; and also, according to the informant, 'was an individual very much concerned with making money'. On the other hand, his partners in the service station, according to the

resume, objected that he was devoting too much time to his religious activities in the Jehovah's Witnesses. The registrant further objected that the resume was incorrect in that his father had not lost his pension rights. Additionally, he claimed that the resume was incorrect in that he had never encouraged another boy to enlist in the Naval Reserve. Other than the objections as above noted, the registrant expressed no opposition to the said resume. Incidentally, it is considered that the resume [75] is a fair and true reflection of the data contained in the registrant's file." And this is the issue that we were discussing previously——

"The registrant further informed that during 1954 he 'Pioneered' in the ministry of the Jehovah's Witnesses for a period of two months. He contended that he was unable to serve a longer period of time as a 'Pioneer Minister' because it was necessary for him to make a secular living."

That means this, Your Honor: A Pioneer is a Jehovah's Witness who serves over a hundred hours a month and by many courts a Pioneer is considered to be a minister within that religion. This defendant said he served for a period of two months back in 1954, but as of '55, the date of this hearing, he had not been serving as a Pioneer Minister.

"His ambition in life is to become a 'Pioneer Minister' and earn a livelihood by part-time work. At the present time he is serving as an apprentice carpenter. His current pay is $1.67 per hour." That was at the time of this hearing.

"He again advised that, because of his religious teachings and belief, he could not engage in non-combatant military service, such as the hospital corps. He informed that he has dedicated his life to Jehovah, and that any type of military service would be inimical to [76] his principles. He further informed that, if he were classified 1-O, he would be unwilling to engage in civilian work for the Government, because to perform such non-military service would be 'breaking his covenant with God and would be a compromise of his covenant'. He stated that although Jehovah's Witnesses are not pacifists, they are opposed to war in any form; that they regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed.'

"He further advised that during the past month he has devoted 12 hours to preaching and about eight additional hours to studying and preparation of religious talks. Currently he is Stock Servant of his congregation, and is also an Area Study Conductor.

"Conclusion:

"Attention is invited to the attitude of certain former employees who expressed the opinion that the registrant was insincere in his claim as a conscientious objector. It is true that the registrant has lived a clean and moral life. It is, however, the opinion of the Hearing Officer that he has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity.

"In light of the fact that it is felt that there [77] is an absence of sincerity to his claim, it is recommended that his claim be not sustained and that he be classified 1-A."

Now, that is the opinion of Mr. Williams after the hearing with this registrant.

I will merely say in closing, Your Honor, that this defendant's rights have been protected by the Local Board, by the Appeal Board and by the courts, that the procedural irregularity in the prior trial has now been corrected. He appeared before Mr. Williams, was given a full opportunity to present his witnesses, to present his case, and Mr. Williams did not believe in the defendant's sincerity, and that was his right. I think that is borne out by the record from the very initial contact of this registrant.

The Appeal Board was certainly justified in viewing his entire record with a careful eye. This registrant adopted the conscientious objection to war only after he had been classified 1-A, within two months or so, I believe—three months, and that during the period prior to his classification he had registered and was perfectly willing to be in the Naval Reserve.

Now, I can only state, Your Honor, that we have a defendant, who, in this case perhaps is a confused boy. I don't know. He admits he was not a minister today, but says that if he received a conscientious objector's [78] classification he wouldn't perform civilian work either. This defendant is subject to

the same laws as any citizen of the United States and this court is to determine whether he has been given his rights and due process and whether there was some basis for his classification of 1-A, whether or not the court would give such a classification.

I submit to Your Honor that the Government has proved its case beyond a reasonable doubt and will rely on the two leading cases in the Ninth Circuit.

The Court: Matter submitted?

Mr. Brill: Submitted, Your Honor.

The Court: Well, you understand on this record there is nothing the court can do but find this defendant guilty. I am bound and limited by this record. Therefore, I will enter judgment of guilty as charged.

Mr. Constine: I assume counsel will have some motions to make.

Mr. Brill: Yes, I would like to have this matter go over for judgment, if the Court please, and ask that the defendant be allowed to remain at liberty under bail.

The Court: I think we better dispose of it. What have you in mind?

Mr. Brill: I suggest the matter be put over one week, if counsel has no objections.

Mr. Constine: I have no objections, whatever [79] counsel and the Court desire. Do you intend to make a motion for probation, that it be referred to the Probation Officer?

Mr. Brill: No, we intend to appeal this matter, but I want to discuss the matter further with my client, Your Honor.

Mr. Constine: You wish one week for sentencing then?

Mr. Brill: Yes.

The Court: Very well, one week for judgment.

The Clerk: September 4, a week and a day.

Mr. Brill: September 4?

Mr. Constine: That will be on a Tuesday. This defendant is on $500.00 bail now.

Mr. Brill: We would ask he remain at liberty on bail, Your Honor, please.

Mr. Constine: We have no objection, Your Honor.

The Court: Very well, he may remain out on the same bail.

(Whereupon an adjournment was taken in these proceedings until September 4, 1956.) [80]

Morning Session, Tuesday, September 4, 1956, 10:00 O'clock A.M.

The Clerk: The United States vs. Selby for sentence.

Mr. Constine: May it please Your Honor, this is the case that proceeded to trial on August 27th before Your Honor for violation of Selective Service for refusal to submit to induction. The defendant was found guilty by Your Honor without a jury and the matter was continued to this date for judgment. No motion was made for probation and it is before Your Honor.

The Court: Is there anything you wish to say before sentence is passed?

The Defendant: Well, last week when we came into court I came into court feeling I was innocent and I still feel that way, Your Honor. There were a few things that happened last week that just for the record I think I would like to say. One of them is that the Government here stated that I had said was no longer a minister, and that certainly is not true for this day I still say I am a minister. He said my files indicate that I no longer was, but I certainly am.

Also, there was the accusation that I Pioneered full time ministry for the purpose of appearing before the Draft Board and I wish to tell you that I had no crystal ball to gaze into to know when the Draft Board was going to call me before that; that is all I have to say. [81]

The Court: Do you want to avail yourself of the opportunity of doing service for the Government aside from military service?

The Defendant: No, I do not. I am a minister. My life is already taken up in service.

The Court: There is other work that you can do that any minister would be glad to do.

The Defendant: I would not, Your Honor.

The Court: Very well. Is there anything further to say?

Mr. Constine: No, Your Honor.

Mr. Brill: I should like to make a statement, if I may, Your Honor. The issue here is whether or not this boy is a conscientious objector. The Draft Board claims he was not a conscientious objector,

so the issue here is not whether or not this boy would be willing to do any other kind of work. The issue is whether or not he was properly classified.

The Court: No, but the law provides that he has an opportunity, if he does not want to do military combat service, to do other types of service. There are other agencies that will be glad to have his assistance, hospitals and what not.

Mr. Brill: If he is classified as a conscientious objector that is true.

The Court: They so classified him. I think they did it legally. In any event, this record does not disclose. [82] He did not even take the stand on his own behalf.

Mr. Brill: I would like further to point out that this was the case in which the Naval Reserve Board found this boy to be a conscientious objector and therefore discharged him from the service. This case was tried once before. Judge Hamlin acquitted this boy, having found that he was improperly classified as 1-A.

The Court: This is a new record entirely, isn't it?

Mr. Brill: Yes, this is a new record, but it is the same issue involved. The file is just the same as it was when it went before Judge Hamlin.

The Court: We will have the representative of the Government explain that.

Mr. Constine: This is the case in which this boy was Classified 1-A the first time. He was acquitted by Judge Hamlin. It was my understanding he was

not afforded all his procedural rights. There were certain documents included that should not have been included; that he was not in the service, he was in the Naval Reserves, and when he asked to be released, he was released. This prosecution was commenced on a second violation. It was actually a new procedure. The Local Board found he was not a conscientious objector. They found him 1-A, and we had the trial before Your Honor and he was convicted on the basis of the record.

The Court: That was my understanding. [83] This is a new record entirely. You did not put in a scintilla of evidence to refute that, not a scintilla.

Mr. Brill: The record itself is the only evidence available to us in a draft case.

The Court: The petitioner himself did not take the stand.

Mr. Brill: That is correct.

The Court: In any event, are you ready for sentence now?

The Defendant: Yes.

The Court: It is the sentence of the court and the judgment of the law that you will be confined in a Federal Penitentiary for a period of two years. That is all.

Mr. Brill: At this time, your Honor, I should like to make a motion to allow this defendant to remain on bail pending appeal. An appeal will be taken in this case and prosecuted in good faith. There is a substantial question involved here and we argued the matter before your Honor. Your

Honor will recall that your Honor recessed the trial in the morning, stating from the bench that there was a question and you wanted further argument in the afternoon. The substantial question is this: The record will indicate that this boy persistently, conscientiously and continually claimed he was a conscientious objector from a period in 1951, and that claim was not in any way refuted by the record made by the Draft Board. The prosecuting attorney pointed out to [84] the court that the reason for this basis in fact of the Draft Board finding this boy 1-A was that he changed from a non-conscientious objector to a conscientious objector at a time when draft was imminent. I pointed out to your Honor that in a case tried in this District and taken up to the Circuit Court of Appeals in the Schumann case that that fact is only a suspicion and will not operate as a basis in fact, will not be considered as a basis in fact for a classification. The mere suspicion that he claimed a conscientious objector classification when his draft was imminent is not and has been held by other districts and other courts, it has been held not to be a sufficient basis in fact to deny his claim of conscientious objector.

This boy comes from a family of Jehovah's Witnesses. His father and mother have been Witnesses from some time in the early 1930's. There are 12 members of his family, ten of whom are Jehovah Witnesses. The attitude of the sect is well known, I think, in relation to their feeling toward the service in the Armed Forces. We feel that there is a sub-

stantial question in this case and we feel that an appeal will be successful, and we ask that your Honor allow this boy to remain free on bail pending appeal. I might point out that the F.B.I. report and the report made by the Hearing Officer in so many words discloses that this boy has led a good, moral life. There is no risk being run by the [85] Government in permitting him freedom on bail pending appeal.

Mr. Constine: If it please your Honor, there is no purpose in re-arguing the case this morning. We did that last week. We disagree with counsel and we question whether there is a substantial question on appeal. We, of course, feel that there is no substantial question, and on that basis we would recommend against the granting of bail on appeal. But I should say to your Honor that there has been a recent amendment of the Federal Rules of Criminal Procedure concerning bail on appeal. I do not have the rule with me now and I think we should have it before that decision is made. There was a rule that there would have to be a substantial question ordinarily before a man would be allowed bail on appeal. There is no substantial question, but nevertheless there has been an amendment to the rule in the last few months and I would like to get that rule before I make a statetment to your Honor concerning it. It will just take me a moment, if I might get the rule.

The Court: Very well, I will pass it.

(Thereupon a recess was taken, after which a determination of this question was made without the presence of the reporter.) [86]

[Endorsed]: Filed Feb. 11, 1957.

[Endorsed]: No. 15376. United States Court of Appeals for the Ninth Circuit. Jay W. Selby, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: October 5, 1956.

Docketed: December 7, 1956.

Reporter's Transcript filed: February 11, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15376

JAY W. SELBY, Appellant.

vs.

UNITED STATES OF AMERICA, Appellee,

POINTS UPON WHICH DEFENDANT WILL RELY PURSUANT TO RULE 17(6); DESIGNATION OF RECORD MATERIAL TO CONSIDERATION

We hereby adopt the Statement of Points and Designation of Record Material to Consideration filed in the District Court, thereby complying with Rule 17(6) of the Rules and Practice of this Court.

Dated: January 4, 1957.

Respectfully submitted,

/s/ J. H. BRILL,
Attorney for Defendant-
Appellant

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Filed Jan. 9, 1957. Paul P. O'Brien, Clerk.